IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ALAN C. FOWLER and THEDA BRADDOCK FOWLER, husband and wife; and GREGORY B. DAVIDSON and HEATHER M. DAVIDSON, husband and wife, Appellants and Cross Respondents, v. JAMES D. LOUCKS and AIMEE R. LOUCKS, husband and wife, Respondents and Cross Appellants.	No. 32845-3-II UNPUBLISHED OPINION

HOUGHTON, J. -- Alan and Theda Fowler appeal from a summary judgment order, arguing that the trial court erred in finding valid amendments made to the Declaration of Restrictions, Easements, Covenants, and Conditions (CC&Rs) affecting their subdivision, Braecrest. We reverse and remand.

FACTS

Nine different couples or individuals, including the Fowlers, Gregory and Heather Davidson, and James and Aimee Loucks, own parcels in an 11-lot subdivision known as

Braecrest. The developer recorded the subdivision's CC&Rs in January 1971.

The original CC&Rs provided that the properties "shall be used solely and exclusively for private one-family and two-family residences" (Article II, section a) and that trucks shall be "housed within a garage or suitably screened from view from the street" (Article II, section e). Clerk's Papers (CP) at 9. Article V, section 1 provided that "any lot or plot owner in Braecrest shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by the provisions of this Declaration." CP at 10. Finally, Article V, section 3 stated: "These covenants and restrictions may be amended by an instrument signed by not less than 75% of the lot or plot owners. Such amendment must be properly recorded." CP at 10-11.

In August 2003, the Louckses moved into Braecrest. James Loucks works for Robison Construction, Inc. (RCI). In connection with his employment, James would drive an RCI tool truck home and park it on the street in front of his house. Additionally, the Louckses had snowmobiles and a camper on the lot, in view of the neighborhood.

After the Fowlers told the Louckses about the residential use restrictions and the parking restrictions contained in the original CC&Rs, the Louckses moved the snowmobiles. But they did not move the camper and RCI truck that remained in the neighbors' view.

The Fowlers tried unsuccessfully to resolve the issue with the Louckses. When those efforts failed, the Fowlers contacted Loucks's employer, RCI, in an attempt to prevent Loucks from taking the truck to Braecrest. In response to this contact and a copy of an unfiled complaint naming both the Louckses and RCI, RCI ordered Loucks not to take the truck home. Later, the Fowlers continued to ask the Louckses to comply with the provisions relating to the camper.

During February and March 2004, the Louckses began a process to amend the original CC&Rs without providing notice to the Fowlers and the Davidsons.[1] Seven of the nine lot owners, comprising 78 percent of the lot owners, executed the document containing the amendments. The amendments were recorded in the Pierce County Auditor's office in early March (New CC&Rs).

Article II, section j of the New CC&Rs provides that "recreational vehicles and equipment, and commercial vehicles used by owners and occupants in their employment must be housed within the owner/occupant's garage, or parked in that lot's additional on-site, off-street parking." CP at 26. Article IV, section 1 changes the enforcement provision to require 75 percent of the lot or plot owners to execute a written document before enforcing any of the CC&Rs.

After amending and recording the New CC&Rs, the Louckses sent a copy to the Fowlers. In response, the Fowlers filed this lawsuit in which they sought a permanent injunction enjoining the Louckses from parking the RCI truck in violation of the original CC&Rs and a declaratory judgment that the New CC&Rs were null and void, that the original CC&Rs were valid and binding, and that the Louckses were in violation of the original CC&Rs. In response, the Louckses moved for summary judgment arguing the amendments' validity and requesting attorney fees.

The trial court entered an order granting the Louckses' motion for summary judgment. The Fowlers appeal.

[1] Both the Fowlers and the Davidsons appeal. For convenience, we refer to them as the Fowlers.

ANALYSIS

The Fowlers challenge the amendment on two grounds. First, they argue that they had a right to receive notice of the amendment under *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994), *review denied*, 127 Wn.2d 1003 (1995). And second, they argue that two of the amended provisions in the New CC&Rs are substantively inconsistent with the residential use restriction and the general plan of the development.

Standard of Review

On review of an order for summary judgment, we engage in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp*., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). We review questions of law de novo. *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993). We uphold a summary judgment order only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Notice Requirement

The Fowlers first contend that *Shafer*'s reference to a "reasonable manner" establishes a procedural component to the amendment process, requiring notice and an opportunity to participate in the amendment. Thus, the question is whether the amendment of the original CC&R procedurally complied with *Meresse v. Stelma*, 100 Wn. App. 857, 865-67, 999 P.2d 1267 (2000) and *Shafer*, 76 Wn. App. 267. That is, we must determine if the lack of notice to the

Fowlers' of the new amendment rendered the amendment unreasonable.

In *Shafer*, Division One held that "an express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately owned property is valid, provided that such power is exercised in a reasonable manner consistent with the general plan of the development." 76 Wn. App. at 273-74. In addition, *Meresse* held that "'the law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants.'" 100 Wn. App at 866 (quoting *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610, 617 (1994)). Thus, we invalidated the amendment because the homeowners in *Meresse* did not act in "'a reasonable manner consistent with the general plan of the development.'" 100 Wn. App. at 865 (emphasis omitted) (quoting *Shafer*, 76 Wn. App. at 274).

Here, the Fowlers argue that a process that denies 23 percent of the lot or plot owners notice and an opportunity to participate constitutes an unreasonable manner under *Shafer*. They also argue, by analogy, that because Braecrest does not have a homeowners' association, they should have received notice as RCW 64.38.035(1) requires homeowners' associations to give notice of amendment proposals. Finally, they assert that restrictive covenants are akin to zoning regulations changes that require compliance with procedural and substantive due process.

The Fowlers' arguments do not persuade us. The release of a CC&R is a real alienation and, therefore, in the usual course, all lot owners of lots subject to the CC&Rs must give consent to modify the provisions. But courts interpret covenants like contracts. *See Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999). Article V(3) of the CC&Rs provided a different